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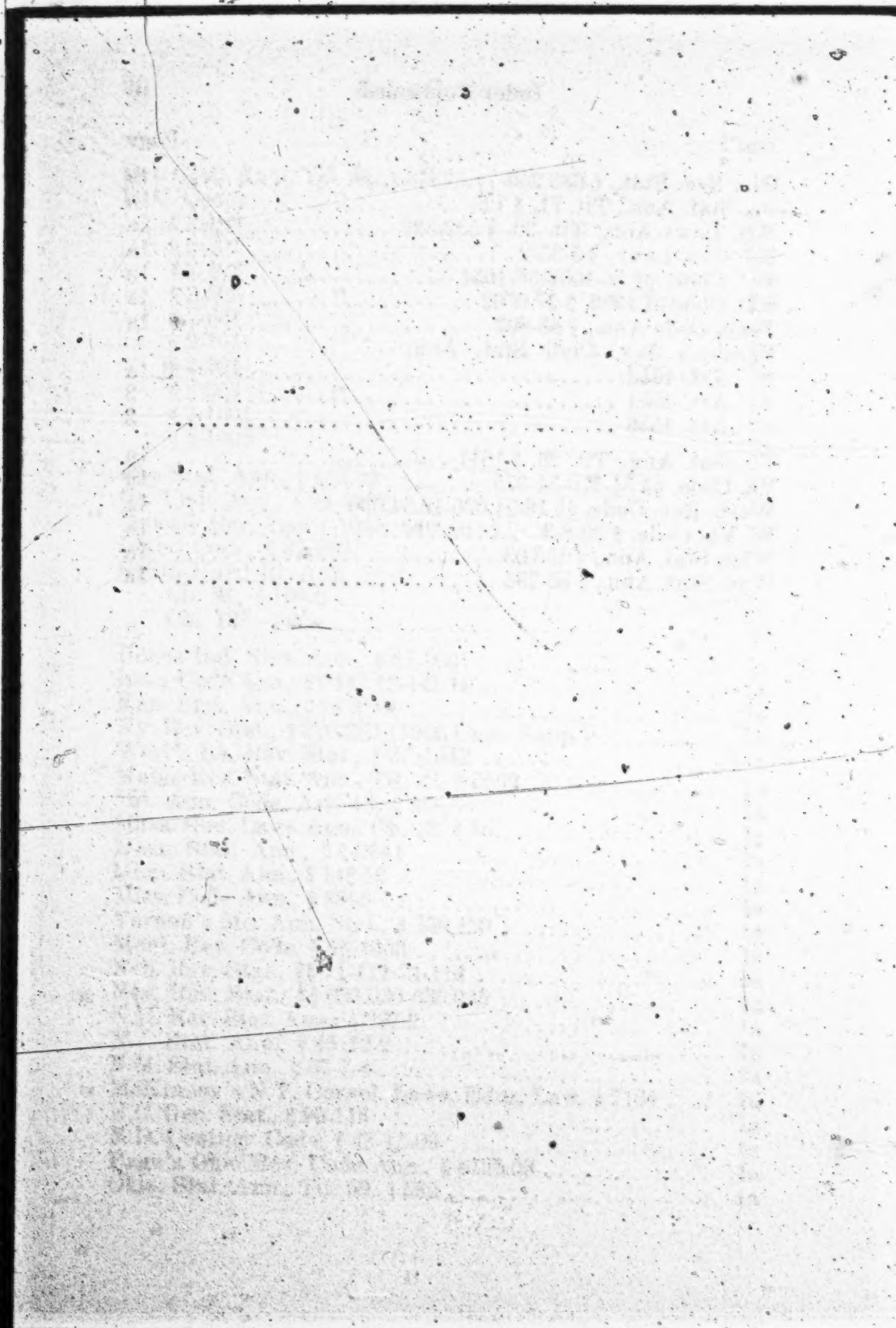

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 481

ELLIS CARP, ET AL., *Appellants*

v.

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, ET AL.

On Appeal From the Supreme Court of the State of Texas

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, this motion to dismiss or affirm is filed on behalf of those members of the Texas State Board of Examiners in Optometry who were sued also in their individual capacities, and on behalf of the North Texas Optometric Society, Inc., and Don Montgomery, et al. (being individual optometrists).

The appeal presents no substantial federal question. The substantive regulation of the profession of op-

tometry which the Texas Supreme Court has here sustained is well within the framework of permissible state regulation which this Court has previously upheld in cases coming from other states. Appellants' attacks on the Texas Board's procedures not only are frivolous, but are based on gross distortion of the facts. Equally frivolous is appellants' claim of conflict with the federal antitrust laws—a claim which, moreover, was never presented in the courts below. Accordingly, plenary consideration of the case by this Court is not warranted.

STATEMENT

This appeal purports to challenge the validity, under the Federal Constitution, of the regulation by the State of Texas of certain aspects of the practice of the profession of optometry within that State. The particular regulation in issue is the Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry on December 21, 1959, the validity of which has been sustained by the Supreme Court of Texas. In general, the rule prohibits the use of assumed or trade names by licensed optometrists in the practice of the profession of optometry in Texas; it prohibits fee-splitting by optometrists with lay persons and, in certain circumstances, with other optometrists; and it contains provisions which require and assure the presence of an optometrist at the offices at which he holds himself out as a practitioner.[1]

Inasmuch as appellants appear to base their constitutional questions on the manner in which the Board is constituted and on the procedures followed by the

[1] The Rule is reprinted in full at pages 66a-71a of the Jurisdictional Statement, hereinafter cited as "J.S.".

Board in adopting the regulation in question, it is appropriate that a fuller statement than that set forth in the Jurisdictional Statement be made.

The Texas State Board of Examiners in Optometry has been and is an official agency of the State of Texas. Created by statute in 1921, it is composed of six members who are appointed by the Governor and confirmed by the Texas Senate. The statute provides that "only optometrists licensed under the laws of Texas and actively engaged in the practice of optometry shall be eligible for appointment on said Board." Vernon's Texas Civil Statutes, Article 4554. Board members must have been residents of the State of Texas and must have engaged in the practice of optometry in Texas for at least five years immediately preceding their appointment, and must "qualify by taking the constitutional oath of office." Vernon's Texas Civil Statutes, Article 4553. Among the statutory powers delegated to the Board is the authority "to make such rules and regulations not inconsistent with this law [the Optometry Act] as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act." Vernon's Texas Civil Statutes, Article 4556. The Supreme Court of Texas in this case has held that the "Board did not exceed its statutory powers in promulgating" the Professional Responsibility Rule (J.S., p. 2a), that the rule was "grounded upon substantial evidence", and that "The necessity for such a rule was demonstrated by the general support it received from the members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct" (J.S. p. 3a).

The Board adopted the Professional Responsibility Rule on December 21, 1959 after having conducted a series of meetings, investigations and hearings on the substance of the regulation during a period of over five years.

On September 4, 1954, the Board convened a special meeting to consider a lengthy petition filed with the Board and signed by 709 of the approximately 900 licensed optometrists in the State of Texas. In this petition, the optometrists made "known the consensus of our opinion as to the urgent necessity for the Board to adopt rules and regulations, for the regulation of the practice of optometry, embodying a standard of professional ethics and conduct on the same plane with the other learned professions". They stated that "We regard the practice of optometry as a profession and not simply as a trade or occupation . . . It should be governed by ethics and rules higher than those of the market place". The petition reviewed some of the evils existing within the profession of optometry in Texas, pointing out, among other things, that "Today in Texas the profession of optometry is being commercialized and exploited at the expense of the visual welfare of Texas citizens", that "Texas has become the promised land for unethical optometrists from the majority of American States, requiring high standards of professional conduct, which limit their opportunity to exploit the public and profession for personal profit", and that "Public trust and confidence, vital to any professional relationship, is being destroyed". The petition emphasized that "the State has a vital interest in the profession of optometry" and that "Experience in the healing art professions has demonstrated that the public interest is best served by re-

quiring practitioners to stand or fall on the genuine merit of their services rather than in allowing them to attract unsuspecting and uninformed patronage by publicity singing their own praises". The petition set forth a list of proposed minimum standards for the profession, and it urged the Board to "exercise the rule-making power delegated to it by the Texas Legislature to regulate the practice of optometry and to establish and enforce rules and regulations" which incorporated the minimum standards proposed (Defendants' Exh. 45, S.F. 2833).[2]

Among the proposed minimum standards were provisions substantially similar to those ultimately adopted by the Board more than five years later in the Professional Responsibility Rule. The minutes of the Board meeting of September 4, 1954 disclose that the Board proceeded to consider the proposed rules and that "after thorough consideration, the matter of the adoption of said rules was referred to the members for further study and consideration". (Defendants' Exh. 45, S.F. 2833). The matter was again considered at a special Board meeting the following day, September 5, but no final action was taken at that time (*ibid*). Thereafter, after further consideration at a special meeting held by the Board on September 18, 1954, the proposed rules were adopted, but then were withdrawn on October 11, 1954 while certain litigation was pending (S.F. 307-309).

On November 30, 1954, the Board received another petition signed by approximately 550 licensed Texas

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[2] "S.F." references are to the pages of the "Statement of Facts" (the transcript in the trial court). In connection with an Exhibit, the S.F. reference is to the page where the particular exhibit was admitted in evidence.

optometrists protesting the action of the Board in withdrawing the rules and regulations and requesting the Board once again to adopt the rules and regulations which had been withdrawn. Upon receipt of this petition, the Board gave notice to "all optometrists licensed by the State of Texas and to all other interested parties" of a public hearing to be held on January 3, 1955 to "consider such petition, hear such parties as desire to be heard and consider the making of rules, regulations and orders for the regulation of the practice of optometry not inconsistent with the laws of the State of Texas". A copy of the petition was attached to each notice, and the recipients were advised that "Licensed optometrists and all other interested parties may appear and be heard on this matter personally or by counsel, or both". The hearing was in fact held on January 3, 1955; the Board did not adjourn until all parties who desired to be heard were heard and it appeared that no person had anything further to present to the Board; the proceedings were recorded and transcribed; and the original transcript was made part of the minutes of the Board meeting and filed at the office of the Board (Defendants' Exh. 46, S.F. 2834).

Thereafter, at a Board meeting held on November 26-27, 1955, it was decided to send a letter (Defendants' Exh. 47, S.F. 2835) to all Texas optometrists informing them of the Board's "activities and efforts toward the regulation of optometry in Texas" since its January 3, 1955 meeting and hearing. The letter advised that two Board meetings had been held since January 3, 1955 and that, "having heard the proponents and opponents of the petition [filed with the Board] it is the unanimous opinion of the board that,

optometry being a profession which vitally affects the public health and welfare, there exists in Texas an urgent need for the regulation of the practice of optometry on an ethical basis and the vigorous enforcement of our optometry law". The letter advised further that it was the unanimous decision of the Board to proceed "at this time" with the consideration of three rules "as beginning steps in a long range program". Drafts of these three rules, known as the Basic Competence Rule, the Bait Advertising Rule and the Corporate Practice Rule, were enclosed in the letter to the optometrists, and each optometrist was requested to vote for or against the adoption of each proposal. The letter advised also that "If a rule is approved by a majority of the profession it will then be immediately submitted to the Attorney General for his official written opinion as to whether the approved rule is constitutional or unconstitutional. When the Attorney General's written advice is in hand it will be given due weight and consideration, and the board will proceed to take action on the rule". It should be noted that appellant Dr. N. Jay Rogers was a member of the Board and approved the foregoing procedure and action (*ibid*).

At a special Board meeting on April 8-9, 1956, the Board's Executive Director reported that the three proposed rules (Basic Competence, Price and Bait Advertising and Corporate Practice) had been approved by the optometric profession of Texas by votes of 555 to 56, 593 to 20 and 585 to 25 respectively. He reported further that, after receipt of a written opinion from the Attorney General of Texas, conferences were held with the Attorney General's office for the purpose of making certain changes "in wording and substance"

which "in the opinion of the Attorney General would have to be made in order to put the rules in proper shape for adoption". After further discussion and consideration of these rules, they were unanimously adopted by the Board, appellant Dr. N. Jay Rogers again being present and voting for their adoption (Defendants' Exh. 48, S.F. 2836). The validity of these three rules was thereafter upheld by the Supreme Court of Texas in *Kee* v. *Baber,* 157 Tex. 387, 303 S.W. 2d 376 (1957).

At its meeting on June 30 - July 3, 1957, the Board unanimously adopted its Rule Making Procedure Rule (appellant Dr. N. Jay Rogers being a member of the Board and voting in favor of the Rule).[8] This Rule, in substance, established as a regular practice the procedure which had been followed by the Board in the adoption of the three earlier Rules above referred up to, of canvassing the views of the optometric profession prior to the final promulgation of a regulation for the practice of optomery. It should be noted that the Rule Making Procedure Rule does not require the Board to promulgate any rule or regulation merely because it has been approved by the profession. Whether to do so or not still remains an official decision for the Board to make in its official capacity. In addition, the Board established at this meeting an Optometry Board Advisory Committee "for the purpose of considering the regulation of the practice of optometry and recommending to the board what rules and regulations, if any, are necessary for the regulation of the practice of optometry in Texas." Each member of the Texas legislature was requested to appoint an optometrist from his district to serve on the

[8] This Rule is reprinted in full at J.S., p. 71a.

Advisory Committee. Appellant Dr. N. Jay Rogers also voted in favor of the creation of the Advisory Committee. (Defendants' Exh. 49, S.F. 2837).

On January 27, 1958 the Optometry Board Advisory Committee made a report to the Board in which the Committee recommended, among other things, by a vote of 110 to 2, the adoption of additional regulations for the optometric profession substantially similar to the provisions of what became the Professional Responsibility Rule here in issue (S.F. 2800). These proposals were discussed at a Board meeting on February 24, 1958 (Defendants' Exh. 52, S.F. 2840) and again at a meeting on June 28, 1958 (Defendants' Exh. 54, S.F. 2842). At this latter meeting the Board adopted certain changes suggested by counsel, and the proposed rule was thereupon submitted to the Attorney General of Texas for "an official opinion as to its validity." After receipt of an official opinion from the Attorney General stating that the Professional Responsibility Rule would be valid, if adopted, the draft rule was mailed to "each of the 839 licensed optometrists practicing in Texas" in accordance with the Rule Making Procedure Rule (Defendants' Exh. 56, S.F. 2843).

Counsel for appellants were advised that the Board would consider the rule at a meeting on December 21, 1959 and were invited to appear and present any matters they desired in connection with the rule. Appellants and their counsel did attend the meeting, at which time it was reported that 542 optometrists had voted for adoption of the rule and that 31 had voted against. The Board minutes state that "Mr. Bergman, attorney for Dr. Carp, spoke at some length to the board in opposition to the adoption of the rule.

He was followed by Mr. Keith, attorney for Dr. Rogers, who also spoke at some length against adoption of the rule." Thereafter, "the board continued the discussion for some time", and finally the Rule was approved by the Board by a vote of 4 to 1 in order, as stated in the preamble of the Rule, "to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship" (Defendants' Exh. 56, S.F. 2843).[4]

On December 22, 1959, the day following the adoption of the Professional Responsibility Rule by the Board, appellants challenged the validity of the Rule in a suit in the 101st District Court of Dallas County, Texas (J.S., pp. 10-11). By a series of court orders and stays, the enforcement of the Rule was restrained (See J.S., p. 42a) during the lengthy period of this litigation. When the Supreme Court of Texas, after sustaining the validity of the Rule (J.S., pp. 1a-14a) and overruling a motion for rehearing (J.S., p. 64a), refused to stay its mandate beyond June 27, 1967, appellants applied to Mr. Justice Black for a stay pending disposition of this appeal. Mr. Justice Black denied the application on June 22, 1967, and on June 26, 1967 Mr. Justice White denied a request for reconsideration of that application.

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[4] In the light of the foregoing, it is difficult to understand appellants' statement on page 9 of the Jurisdictional Statement that at the December 21, 1959 meeting "the Board once again neither presented nor heard any evidence designed to show that the Rule's provisions were necessary or even reasonable." A footnote on the same page, however, and another on page 17, admit that appellants appeared at the hearing and argued against adoption of the rule, and there is no contention anywhere that the Board refused to hear any evidence of any kind that appellants desired to offer.

ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

1. It is settled that a state may, consistently with the Federal Constitution, impose upon the practice of the profession of optometry within the state the substantive regulation embodied in the Professional Responsibility Rule. The Rule "is a measure directly related to the protection of the public health" and "thus falls within the most traditional concept of what is compendiously known as the police power." *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 428. The authority of the several states to regulate the practice of the health professions within their borders pursuant to the police power is beyond question (*Head* v. *New Mexico Board of Examiners in Optometry, supra; Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483; *Semler* v. *Oregon State Dental Examiners,* 294 U.S. 608; *Roschen* v. *Ward,* 279 U.S. 337), and appellants do not, and indeed cannot, contend that the Rule here involved is beyond the power of the State of Texas to impose. Nor does the Federal Constitution impose any barrier to the State's delegating to a state administrative agency the authority to prescribe detailed regulations of the profession of optometry. *Michell* v. *Louisiana Board of Optometry Examiners,* 245 La. 1, 156 So. 2d 457, appeal dismissed for want of a substantial federal question, 377 U.S. 128; *Strauss* v. *University of State of New York,* 2 N.Y. 2d 464, 161 N.Y.S. 2d 97, 141 N.E. 2d 595, appeal dismissed for want of a substantial federal question, 355 U.S. 394. Moreover, there is not, nor can there be, any question of the authority of the Board to promulgate the Rule involved in this case, for the

Supreme Court of Texas has held that the "Board did not exceed its statutory powers in promulgating the rule" (J.S., p. 2a) and that the Rule was "grounded upon substantial evidence" (J.S., p. 3a).

2. Appellants contend (J.S., pp. 13-20) that the procedures followed by the Board in adopting the Rule deprived them of their property without due process of law. This contention, even if it had been properly preserved by appellants in accordance with Texas procedural requirements, is so lacking in substance as to be frivolous.

The Texas State Board of Examiners in Optometry is not a private group of optometrists. It is a duly-constituted official agency of the State of Texas, established pursuant to Texas statute. Its members are appointed by the Governor of Texas, are confirmed by the Texas Senate, and qualify by taking the constitutional oath of office. The record in this case (see *supra*, pp. 4-10) discloses that the Professional Responsibility Rule was adopted by this duly-constituted official state Board after the most careful study and investigation and after a series of meetings and hearings extending over a period of more than five years. Every optometrists in the State of Texas and all other interested parties were afforded ample opportunity to be heard before the Board; appellants and their counsel did, in fact, appear before, and were heard by, the Board; the Rule was supported by the overwhelming majority of the optometric profession in Texas; the Attorney General of Texas, prior to the adoption of the Rule, had provided the Board with an official written opinion holding that it was valid; the Board, in promulgating the Rule, did so "In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility,

and further safeguard the doctor-patient relationship;" and the Supreme Court of Texas found that "The necessity for such a rule was demonstrated by the general support it received from members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct" (J.S., p. 3a).[5] There is no basis whatsoever for such incredible assertions as the appellants' assertions that the Rule "was established by private members of the optometry profession in Texas, rather than by any state body or agency officially concerned with the public interest" (J.S., pp. 13-14); or that "The Board of Examiners never exercised its judgment on whether the Rule was in the public interest" (J.S., p. 16); or that "No state official or body ever made or even pretended to make any determination that the Rule was in the public interest" (J.S., p. 17). Assertions such as these are frivolous and a sham.

3. Similarly, appellants' contention (J.S., pp. 20-27) that the Rule is void because it was adopted pursuant to a conspiracy to put them out of business is totally lacking in substance.

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[5] The Texas Court of Civil Appeals held the Rule invalid only because, in its view, "the Board in adopting it acted beyond the powers delegated by the Legislature" (J.S., p. 37a). This holding was, of course, reversed by the Supreme Court of Texas. But the Court of Civil Appeals expressly rejected all of the other contentions made by appellants. It held that the Board's action was "supported by substantial evidence" and that the contentions that the Rule was invalid "because it impairs the obligation of contracts, takes or destroys appellants' property without due process, bears no reasonable relationship to the health and well-being of the citizens of Texas, is retroactive in its legal effect and permits the Board to delegate unlawfully its rule making powers to outsiders (members of the profession of optometry)" were all without merit (J.S., p. 37a).

(a) The assertion that appellants were denied due process of law under the Federal Constitution because of the existence of a conspiracy is without merit (J.S., pp. 21-24). In Texas, as in most states,[6] the Board is required by statute to be composed of licensed optometrists. Appellants seem to be complaining that, somehow or other, a conspiracy exists because the majority of the members of the Board, after having conducted extensive investigation and having surveyed the views of the profession, reached a point of view very different from appellants' as to what constitutes the ethical practice of the profession. Certainly, the canvassing of the views of the optometric profession does not create a conspiracy. *Parker* v. *Brown,* 317 U.S. 341, 350-352; see *Currin* v. *Wallace,* 306 U.S. 1, 15-18; cf. *Eastern R.R. Conference* v. *Noerr Motor Freight,* 365 U.S. 127. The court below in the original mandamus proceeding in this case (see J.S., p. 11) aptly disposed of the contention as follows (J.S., pp. 49a-51a):

> Article 4553 requires that members of the Board "shall possess the necessary qualifications to practice optometry". Those appointed to serve on the Board, as is true of all administrative agencies, necessarily bring their individual professional viewpoints with them. These may or may not be shared by either a majority of the Board, or by a majority of the profession itself. But the members of the Board having the same professional objectives will necessarily join together in voting upon rules and regulations to govern the profession and those in the majority will prevail. The views thereby translated into governing regulations will coincide with the views of others, and

[6] See Appendix, *infra*, pp. 1a-2a.

perhaps a majority, of the profession. But this is not unlawful conspiracy; it is neither unlawful in itself, nor is it the accomplishment of a lawful objective by unlawful means. Cf. *State* v. *Standard Oil Co.*, 130 Tex. 313, 107 S.W. 2d, 550 (1937). The invalidation of an administrative order apart from, and regardless of, its validity as a matter of law when measured by the standard of the substantial evidence rule requires a showing of circumstances under which it would be shocking to the judicial conscience to permit the order to stand. This requires, in turn, a showing of conditions comparable in seriousness to corruption, fraud, dishonesty or bribery in the promulgation of the administrative order. *This is not alleged here, and there is no contention that such is shown by the evidence in the trial of the case.* (Italics supplied).

(b) Appellants' contention that the Professional Responsibility Rule constitutes a conspiracy in restraint of trade in conflict with the federal antitrust laws (J.S., pp. 24-26) was not raised or presented in, nor was it decided by, any of the courts below. The Jurisdictional Statement makes no reference to any point in this lengthy record where any conflict with the federal antitrust laws was asserted; indeed, there is not even any allegation in the pleadings, and no proof was adduced, that interstate commerce is in any way involved or affected. Cf. *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 427-429. The federal antitrust claim clearly cannot be raised here for the first time. *Safeway Stores* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 342, n. 7. In any event, the contention is wholly without substance and frivolous. *Parker* v. *Brown*, 317 U.S. 341, 350-352; see also *Eastern R.R. Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 135 *et seq.*

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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APPENDIX

The statutes of 46 states and the District of Columbia require that the members of the state optometry boards be state-licensed optometrists. Ala. Code, Tit. 46, § 192; Alaska Statutes, § 08.72.040; Ariz. Rev. Stat., § 32-1702; Ark. Stat. Ann., § 72-802; Col. Rev. Stat. 1963, § 102-1-6; Conn. Gen. Stat., § 20-128; Del. Code Ann., Tit. 24, § 2102; D.C. Code, § 2-503; Fla. Stat. Ann., § 463.02; Ga. Code Ann., § 84-1102; Hawaii Rev. Laws 1955, Ch. 68, § 3; Idaho Code, § 67-2907; Smith-Hurd Ill. Ann. Stat., Ch. 91, § 105.6; Ch. 127, § 60a; Burns Ind. Stat. Ann., § 63-1001; Iowa Code Ann., §§ 147.12–147.16; Kan. Stat. Ann., § 74-1501; Ky. Rev. Stat., § 320.230 (1966 Cum. Supp.); West's La. Rev. Stat., § 37:1042; Maine Rev. Stat. Ann., Tit. 32, § 2502; Mass. Gen. Laws Ann., Ch. 13, § 16; Mich. Stat. Ann., § 14.641; Minn. Stat. Ann., § 148.52; Miss. Code Ann., § 8835; Vernon's Mo. Ann. Stat., § 336.130; Mont. Rev. Code, § 66-1303; Neb. Rev. Stat., §§ 71-111–71-114; Nev. Rev. Stat., §§ 636.030–636.035; N.H. Rev. Stat. Ann., § 327.2; N.J. Stat. Ann., § 45:12-2; N.M. Stat. Ann., § 67-7-4; McKinney's N.Y. Consol. Laws, Educ. Law, § 7104; N.C. Gen. Stat., § 90-116; N.D. Century Code, § 43-13-03; Page's Ohio Rev. Code Ann., § 4725.03; Okla. Stat. Ann., Tit. 59, § 582; Ore. Rev. Stat., § 683.250; R.I. Gen. Laws, § 5-35-2; S.C. Code, §§ 56-1053–56-1054; S.D. Code of 1939, § 27.0702; Tenn. Code Ann., § 63-803; Vernon's Tex. Civil Stat. Ann., Art. 4553; Vt. Stat. Ann., Tit. 26, § 1641; Va. Code, §§ 54-370–54-375; Wash. Rev. Code, §§ 18.54.020–18.54.030; W.Va. Code, § 30-8-3; Wisc. Stat. Ann., § 153.03; Wyo. Stat. Ann., § 33-294.

In other states, the membership of such boards is composed of optometrists and one public official (Pa. Stat. Ann., Tit. 71, § 125), or optometrists and one "public member" (West's Cal. Ann. Bus. & Prof. Code, §§ 3010-3011), or optometrists and either one (P.R. Laws Ann., Tit. 20, §§ 532-533) or perhaps two physicians (Md. Ann. Code, Art. 43, § 368). Supervisory and examining boards for other

professions frequently are composed of members of the profession involved. See, for example, D.C. Code § 2-109 (Board of Examiners in Medicine and Osteopathy); § 2-301 (Board of Dental Examiners); § 2-402 (Registered Nurses Examining Board); § 2-607 (Board of Pharmacy); § 2-701 (Board of Podiatry Examiners); § 2-801 (Board of Examiners in Veterinary Medicine); § 2-903 (Board of Accountancy); and, §§ 2-1001, 2-1002 (Board of Examiners and Registrars of Architects).